The Principle of Indemnity in Marine Insurance Contracts

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A Comparative Approach

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For George & Robert

Preface

Marine Insurance is considered one of the oldest of the many forms of commercial protection. It has flourished through the establishment of the institution of the *"coffee-houses"*, wherein *"underwriting"* was being conducted and from where the evolution and dominance of the Lloyd's has stemmed as the world's most famous insurance market. Marine insurance contracts are special in that they have special characteristics and also because they are contracts of indemnity.

This book examines the *principle of indemnity* within marine insurance contracts. The legal problems related to the principle, in theory and in practice, are discussed and evaluated through the citation and critical analysis of the relevant case law in England as well in some of the most representative common law and continental law jurisdictions, together with an analysis comprising thoughts and proposals on possible extensions, further research options, and a possible future law reform.

The book comprises of six (6) chapters: chapter one (1) discusses the history of marine insurance in England and the policy reasoning behind the enactment of the various English statutes as well as the history, legal framework and the way marine insurance is regulated in the other jurisdictions. Chapter two (2) discusses the concept and importance of insurable interest in relation to indemnity marine insurance contracts and the coverage offered under such contracts both in England and in the other legal systems. Chapter three (3) discusses types of losses in England and the rest of the law regimes. Chapter four (4) discusses valuation and the measure of indemnity available according to the type of contract each time as well as in the case of double insurance, both in England and in the rest of the legal systems. Chapter Five (5) examines the legal issues related to the rights of insurer on payment, in all jurisdictions. Chapter six (6) draws some general comparative conclusions and also explores the scope and nature of a reform in the area, in light also of the ongoing attempt for unification, which has been undertaken since 1998 by the *Comité Maritime Internationale* (CMI).

The book is an updated version of the Ph.D. thesis of the author, which was submitted, defended and accepted from the School of Law, University of Southampton, UK in 2004.

I am indebted to the Max Planck Society for the bursary which allowed me to read as a guest scholar at the Max Planck Institute of Comparative and Private International Law in Hamburg (April 2002). I am also indebted to the Research Council of Norway for the research scholarship which enabled me to visit and research at the Scandinavian Institute of Maritime Law, within the Faculty of Law of the University of Oslo in Norway (November 2002). I would also like to thank Prof. Y. Tassel of the University of Nantes, France for providing me with the opportunity to read as a guest scholar at the *Centre de Droit Maritime et Océanique* of the University of Nantes in France (March 2003).

The law is stated as at October 1st, 2006.

Birmingham, October 2006 Kyriaki Noussia

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Abbreviations

AC	Appeal Court
Australian ICA	Australian Insurance Contracts Act
Australian MIA 1909	Australian Marine Insurance Act 1909
AIMU	American Institute of Maritime Underwriters
AK	Αστικός Κώδιξ
All ER	All England Law Reports
ALRC	Australian Law Reform Commission
AMC	American Maritime Cases
ANZ Cases	Australia & New Zealand Cases
App Cas	Appeal Cases
Αρμ	Αρμενόπουλος
B&PNR	Bosanquet & Pullet's New Reports
Bos & Pul (NR)	Bosanquet & Pullet's New Reports
B&C.	Barnwall & Cresswells' King's Bench Reports
B&Ad	Barnwall & Adolphus' King's Bench Reports
Bing NC	Bingham's New Cases
Brod & B	Broderip & Bingham's Common Pleas Reports
Burr	Burrow's King's Bench Reports
CA	Cours d' Appel
Camp	Campbells' Nisi Prius Cases
CB	Common Bench Reports
CCA	Consolidated Case Annotations
C&F	Clark & Fineelly's House of Lords Cases
Ch	Law Reports Chancery Division
c.i.f.	Cost Insurance Freight
CMI	Comité Maritime Internationale
Circ	Circuit
CLC	Common Law Cases
Com Cas	Commercial Cases
CPD	Law Reports Common Pleas Division

CPML	Code of Private Maritime Law
DMF	Droit Maritime Francais
East	East's Term Reports, King's Bench
ΕΕμπΔ	Επιθεώρηση Εμπορικού Δικαίου
ΕλΔ	Ελληνική Δικαιοσύνη
ΕΝαυτΔ	Επιθεώρηση Ναυτικού Δικαίου
Ex	Exchequer Reports
Exch	Exchequer Reports
ExD	Law Reports, Exchequer Division
FCas	Federal Cases
Fed Rep	Federal Reporter
F 2d	Federal Reporter, Second Series
Fed Supp	Federal Supplement
HL	Clark & Finelly's House of Lords Reports
H&C	Hurlstone & Coltman's Exchequer Reports
HL Cas	House of Lords Cases
Holt NP	Holt's Nisi Prius Law Reports
ICA	Insurance Contracts Act
ICC	International Cargo Clauses
IJOSL	International Journal of Shipping Law
IntILR	International Insurance Law Review
IHC	International Hull Clauses
ISC(C)	Institute Strike Clauses (Cargo)
IWC(C)	Institute War Clauses (Cargo)
JBL	Journal of Business Law
JMarLC	Journal of Maritime Law and Commerce
KB	King's Bench
ΚΙΝΔ	Κώδιξ Ιδιωτικού Ναυτικού Δικαίου
ΚΔΝΔ	Κώδιξ Δημοσίου Ναυτικού Δικαίου
LlLRep	Lloyd's Law Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LOF	Lloyd's Standard Form of Salvage
LR	Law Reports
LRCP	Law Reports Common Pleas
LRHL	Law Reports House of Lords
LRQB	Law Reports Queen's Bench
Lloyd's Rep.	Lloyd's Reports
LT	Law Times Reports
MIA	Marine Insurance Act
MIA RSBC	Marine Insurance Act Republic

	State of British Columbia
MIA RSM	Marine Insurance Act Republic State of Manitoba
MIA RSNB	Marine Insurance Act Republic State of New Brunswick
MIA RSO	Marine Insurance Act Republic State of Ontario
NMIP	Norwegian Marine Insurance Plan
NoB	Νομικό Βήμα
NSWLR	New South Wales Law Review
P&I	Protection and Indemnity
PIB	Provisional Insurance Bureau
ppi	Policy Proof Interest
QB	Queen's Bench
SCt.	Supreme Court
SCR	New Supreme Court Reports
SDNY	State District of New York
SDNYDC	State District of New York District Court
SG Policy	Ship and Goods Policy
Shaw	Shaw's Session Cases
S&M	Sweet & Maxwell
Sup Ct (NSW)	Supreme Court (New South Wales)
Taunt	Taunton's Common Pleas Reports
TLR	Times Law Reports
UNCTAD	United Nations Commission on Trade & Development
UN	United Nations
Vern	Vernon's Chancery Reports
Ves Sen	Vesey Senior's Chancery Reports
W&L	Washington & Lee Law Review
WLR	Weekly Law Reports

1.The history and legislative framework of marine insurance

1.1. Historical and policy reasons behind the various English statutes

1.1.1. Early historical background

Marine Insurance, the oldest of the many forms of protection against losses, has a long history which dates back to antiquity and is coeval with maritime commerce itself. The ancient Phoenicians, the Greeks and the Romans - although unacquainted with the art of *"underwriting"* as the latter is being practised nowadays at Lloyd's - were in the habit of guarding themselves against some of the risks of maritime enterprise by various systems of insurance, whether in the shapes of loans or mutual guarantee.[1]

One of the oldest systems is the loan form known under the name of *"Bottomry"*. It is defined as the mortgage of a ship[2], in such a manner that if the ship be lost the lender likewise loses the money advanced on her, but if she arrives safely at the port of destination, he would get back the loan and a certain premium previously agreed upon.

The system of insurance arising out of *"Bottomry"*, came to be not only amidst the oldest but also amidst the most wide-spread forms of marine insurance. This is principally for two reasons, the first being the extreme simplicity of the transaction and the second being the desire to escape the penalties of the universally prevailing laws against usury, by which was understood the lending of money on interest.

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[1] Although it was probably the Greeks and the Phoenicians who were among the first to have insured against maritime loss, the first existing record of marine insurance appears to have originated from a Roman edict of A533, in the reign of Emperor Justinian.

[2] i.e. her bottom or hull.

The form of marine insurance, known as *"Bottomry"*, differs from the contemporary one, in that while Bottomry loans are compensations advanced before the actual loss of a ship, modern policies of insurance are promises to pay compensation after the loss has occurred.

Although *"Bottomry"* is said to have formed the commencement of marine insurance at the revival of commerce in the Middle Age, it was, nevertheless, not long before it grew out and developed into the modern system of insurance. Indeed, insurance - as a term - occurs for the first time in an old historical work called *"Chronyk van Vlaendern"*, which refers distinctly to the existence of marine insurance as early as the beginning of the 14th century at Bruges, where it is believed that the first *"Chamber of Insurance"* existed.

1.1.2. The Lombards

Over the centuries, various forms of marine insurance have flourished and faded in various parts of Europe. The Hanseatic merchants of northern Europe had an insurance centre based at Bruges, known as the first *"Chamber of Insurance"*. In 1432, the city of Barcelona also laid down the first recorded statute for insuring ships. Meanwhile, the first form of marine insurance in Britain had been started by a group of Hanseatic merchants, and was later carried on by some German colonists who were the first known London underwriters to have exercised marine insurance almost exclusively with no apparent sign of competition for many years.

It was only until the late years of their existence that they were faced with competition from another group of foreign immigrants, *"the Lombards"*[3] - who took their name from the name of the street where their businesses and trading firms were established, i.e. Lombard Street and who were the first ones to have seriously engaged in the area of marine insurance. It is believed that from them also originates the word *"polizza"*- i.e. a promise - which is the root of the term *"policy"*.[4] The Lombards begun marine insurance by advancing sums on Bottomry loans. Their activity came to an end when England's foreign trade came to the hands of Englishmen; although gone, they, nevertheless, have left something very important in the foundation of a most important branch of finance and commerce, in that they brought marine insurance practice into general use by

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[3] Brown A (1987) Hazard Unlimited: The Story of Lloyds of London, LLP, pp. 16-17.

[4] Brown A (1987) Hazard Unlimited: The Story of Lloyds of London, LLP, pp. 16-17

making it acceptable to the trading community at large, by the introduction of proper rules and regulations.

1.1.3. Early English marine insurance

The commencement of the 17th century formed the starting point of a new period in the history of marine insurance in Great Britain. During the first period, dating back to the beginnings of foreign commerce and ending within the 16th century, marine insurance was carried on chiefly, if not entirely, by foreigners; whilst during the second and subsequent period it fell into the lap of native enterprise.

A distinct line and division between the two periods was formed by the Elizabethan Act of 1601.[5] Being the first statute prepared by the English Government and passed by the Parliament, it was titled *"An Act Concerning Matters of Assurances Amongst Merchants"* and it is highly memorable as the first statute-book regarding marine insurance. The Act of 1601 also established the Court of Insurance, which was unfavourably looked upon both by the mercantile community and the courts of common law, and, as a result of that, only few actions appear to have been brought before it.

1.1.4. The founder of Lloyd's and the rise of the Lloyd's coffee house

Until 1666, the business of underwriting is not known to have been carried in any other specific fixed localities other than at the private offices of bankers, money-lenders and others who also pursued their own avocations besides.

After this period, numerous coffee houses were gradually established in the City of London for the purpose of underwriting.[6] Their establishment had a political importance and at the same time exercised a

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[5] The reason why marine insurance, so long in existence, did not occupy the attention of English legislators any earlier is believed to lie in its foreign origin and growth.

[6] Among the names of known masters of such coffee-houses, gathered from newspaper advertisements are Hains, Garraway and Thomas Good.

marked influence on the business of marine insurance.[7] Within a few years they sprung all over London, and merchants visited them chiefly, if not entirely, for business purposes.

The first London coffee house was opened in 1652, by a Mr. Bowman, in St. Michael's Alley, Cornhill, London.

The *"Lloyd's Coffee House"* originally located in Tower Street, moved to Lombard Street around 1691 or 1692. This, together with the issuing of the weekly newspaper *"Lloyds News"*, furnishing commercial and shipping news, made it the place of resort for persons connected with the shipping business. In 1771, a Committee was elected to represent the underwriters and alongside the payment of a subscription - the first significant movement of underwriters themselves towards assumption of responsibility for the organisation of the market - effectively transformed Lloyd's from a coffee house into an organisation of underwriters. Yet, it was not until the first Lloyd's Act in 1871, that it became a structured organisation regulated by a constitution.

1.1.5. The first marine insurance companies

During the time of the *"South Sea Bubble"* scandal and the manic period following it, more than two thousand company schemes were set afloat mostly in the shape of joint-stock undertakings. Among the schemes brought forward, nearly a hundred of them related to insurance and, furthermore, very few among them were devoted partly or entirely to marine insurance. The bursting of the *"South Sea Bubble"* scandal retarded the development of incorporated companies. Of the companies and projects that found way into the public, only two survived, namely the *"London Assurance Corporation"* and the *"Royal Exchange Assurance Corporation"*.[8] In 1720 an Act was passed, namely *"The Bubble Act"*, giving them the right and monopoly of insuring ships and merchandise. The monopoly granted to them proved to be one of the foundation stones of the greatness and growth of Lloyd's. Thus, at face value, the impact of *"The Bubble Act"* was threefold: firstly, individual underwriting via brokers remained unfettered; secondly, competition was introduced in the form of the *"Royal Exchange Assurance"* and the *"London Assurance"* companies; and

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[7] They proved very convenient meeting places, for men engaged in a common object not requiring much time, and were as if made entirely for underwriters.

[8] The first idea of starting these two companies, however, arose long before the *"South Sea Bubble"* scandal. These two companies were largely supported by the Government.

thirdly, the marine insurance market was closed absolutely, except to individual underwriters and the two corporations. Thus, the explanation for Lloyd's dominant position in the marine insurance market lies in the combination of corruption, chance and commercial expediency.

1.1.6. The evolution of Lloyd's and other forms of marine insurance companies

The *de facto* monopoly enjoyed by individual underwriters, centred at the premises of Lloyd's, was not to the liking of all shipowners, especially those from provincial ports who found the London underwriters remote and unsympathetic, the Lloyd's premium rates unrestrained by any effective competition and the solvency of any given individual underwriter non predictable.

Thus, shipowners united and constituted unincorporated associations, in order to provide mutual hull insurance. These associations came together to share with each other their hull risks on a mutual basis which is still the basic concept of Protection & Indemnity (P&I) Clubs, despite the fact that they are now incorporated so that in law it is the P&I Club - and not the individual members - providing the insurance. Alhough these unincorporated associations declined due to competition from Lloyd's and the new corporate insurers that entered the market after 1824, the fact that their mechanism was established gave birth to a new generation of mutual insurance associations - which developed into the modern P&I Clubs which cover a variety of third party liabilities - to which shipowners were subject and which the London market and the insurance companies did not cover. Along with the decline of those unincorporated associations came the need to create similar associations, which resulted in the formation of the first protection association - namely the *"Shipowners' Mutual Protection Society"* (predecessor of the *"Britannia P&I Club"*) - in 1855. In 1874, the risk of liability for loss of or damage to cargo carried on board the insured ship was first added to the cover provided by a protection Club. Since then, many Clubs added an indemnity class to provide the necessary cover.[9]

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[9] Members of the modern P&I Clubs are shipowners and other sea operators, such as charterers. Control of the association is vested in a committee or board of directors elected by the members from among themselves, whereas management is delegated to the club managers, either club employees or independent management companies. (Bennett H(1996) The Law of Marine Insurance, Clarendon Press, Oxford, pp 8-9).

Generally speaking, the categories existing nowadays are the market insurance[10] and the mutual insurance.[11] The function of both categories is that mutual insurance companies provide cover against P & I, war and defence risks; whilst the London market offers marine property insurance together with some collision liability cover. Regarding war risks, the associations offer both property and liability insurance. There is a difference in the ethos that market insurance and mutual insurance share, as the former consists a purely financial bargain, where cover is purchased for a fixed premium from a profit-making entity, and the latter consists of non-profit making organisations permitting pooling of losses over a given period at the cost of a contribution thereto, and where the payable amount is depending on the magnitude of the losses which actually occur.[12]

1.1.7. The growth and evolution of the system and law of marine insurance

Over a hundred years passed after the enactment of the 1601 Act, before any other statute related to marine insurance was adopted.

The Marine Insurance Act of 1745 prohibited the making of policies of marine insurance in the subject matter of which the assured had no interest. This was the first attempt, towards a statutory intervention in marine insurance law, which sought to put an end to the practice of wagering disguised by marine policies, whereby persons without interest in a vessel or its cargo would insure using a marine policy form. The 1745 Act required those procuring marine policies to be interested in the subject-matter, and similarly prohibited the practice of insuring on the basis of "*policy proof of interest*", which had become the standard method of gambling by means of insurance and which rendered enforceable insurances without interest at common law.[13] In 1788, a further Act was passed, which prescribed that all policies made out in blank, were void. It also required the names of all parties interested in a marine policy, to be inserted into the policy. This Act was largely ineffective - as its provisions were satisfied so long as the assured's agent was named in the policy - and it was repealed

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[10] Incorporating the Lloyd's and the London market.

[11] Incorporating the provincial mutual insurance associations – modern protection and indemnity associations or "P & I" Clubs.

[12] Bennett H (1996) The Law of Marine Insurance, Clarendon Press, Oxford, pp. 8-9.

[13] This Statute was finally repealed by the Marine Insurance Act 1906, the provisions of the earlier Act with regard to *"no interest"* policies being re-enacted in Section 4 of the Marine Insurance Act 1906.

by the Marine Insurance Act 1906, in so far as it applied to marine insurance, however, still operates with regards to non-marine policies on goods.[14]A later statute of 1795, required all policies of marine insurance to be in writing and to be stamped. The subsequent to it Act of 1803, imposed penalties on individuals directing or prosecuting frauds on insurers and was enacted because of the case of *Adventure*.[15] Finally, the Policies of Marine Insurance Act 1868 facilitated the assignment of insurance contracts and was reproduced in sections 50-51 of the Marine Insurance Act 1906.[16] In 1894 *"The Marine Insurance Codification Bill"* was introduced in the House of Lords, and it is the content of this Bill , slightly altered, which provided the basis for the Marine Insurance Act 1906, namely *"An Act to Codify the Law Relating to Marine Insurance"*.

The early marine insurance legislation, in so far as it was concerned with substantive issues, affected only insurable interest, with the market and the courts being left to develop the principles of marine insurance law. Those principles were ultimately codified in the Marine Insurance Act 1906.[17] The Marine Insurance Act 1906 did not seek to change the law but, rather, was a codification of approximately 200 years of judicial decisions. There was, and remains, no equivalent non-marine codification, although at various points the Marine Insurance Act 1906 reflects both marine and non-marine law.

However, the Act has to be viewed with some degree of caution. Much of it is concerned with laying out presumptions which operate only in the absence of any contrary agreement between the parties, whereas in practice, marine insurance contracts, written in England, are governed by the various sets of Standard Marine Clauses published by the International Underwriting Association of London which frequently oust many of the Marine Insurance Acts' presumptions. The Marine Insurance Act 1906 must also be viewed as a snapshot of the law relating to marine insurance practice, as it existed in 1906. Since then, there have been many significant changes in practice, and certain of the Act's concepts relate to superseded forms of dealing. There are also a number of important post-Act decisions, refining the meaning of the Act's wording. Lastly, the Marine Insurance Act 1906 is not fully exhaustive, though most of the important principles of marine insurance law have been enshrined in it.

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[14] Merkin R (2000) Marine Insurance Legislation, LLP, p.xxxvii.

[15] The captain of the vessel *Adventure* caused her to be cast away off Brighton. Very heavy insurances-mainly of a fictitious character-had been effected on the vessel and her cargo.

[16] Merkin R (2000) Marine Insurance Legislation, LLP, p.xxxvii.

[17] An Act drafted by Sir Mackenzie Chalmers.

Because of Marine Insurance Act 1906 section 4,[18] a later statute was enacted, i.e. the *"Marine Insurance (Gambling Policies) Act 1909"*. The statutes are cited as *"The Marine Insurance Acts 1906, 1909"*. The later imposed certain criminal responsibilities on the parties to contracts of marine insurance effected by way of gaming or wagering on loss by maritime perils.[19]

The 1906 Act approved the use of the document known as *Lloyd's SG Form of Policy*. The *Ship and Goods (SG) Policy* was formally adopted by Lloyd's in 1779. It is included in the Schedule to the Marine Insurance Act 1906, and much of the codification contained in the Act concerns cases decided on its wording. The Institute of London Underwriters, took on the responsibility of drafting clauses to deal with aspects of the *SG Policy* thought to be unsatisfactory, and these were appended to policies. Standard form clauses for all aspects of marine insurance were adopted, as annexes to the *SG Policy*, and new ones drafted in 1982 and 1983 broke the link with the *SG Policy* which was scrapped and replaced with a simplified form of wording to be used as a cover sheet for the relative Institute Clauses. The Institute Clauses have been revised many times, lastly in November 2003.[20]

1.1.8. The policy reasons which generated the enactment of the Marine Insurance Act 1906

The sources and policy reasons behind the enactment of the Marine Insurance Act 1906 can only be traced if one carefully examines the Parliamentary Debates that lead to the passing of the Bill[21]. The Bill proposed to state

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[18] Which lacked repressing gambling on loss - by maritime perils - and imposed no penalties on those who were parties to such contracts.

[19] Dover V (1957) A Handbook to Marine Insurance, pp. 30-35.

[20] A number of different forms of insurance are required to provide full cover for a marine adventure and these are all available under Institute Clause wording, the three main heads of cover being cargo, hull and freight, (Merkin R (2000) Marine Insurance Legislation, LLP, p.xxxvii).

[21] During its second reading it was stressed, by the Earl of Halsbury, that the Bill was of an extreme importance very seriously affecting an enormous business. Similarly, the Attorney General pointed out that the codifying Bill would constitute a great convenience to the mercantile community which would want to have this branch of law put into a comprehensive and intelligible form, give that the law (as it stood at that time) was primarily found in cases in the law reports and, as a result of that, was not always easily accessible or understood by the ordinary layman.

the whole of the existing law so that the merchantile community would know exactly which liabilities it had. It was a Bill demanded by all involved in the mercantile community and its' passing was the most valuable measure to be appreciated by this community.

It is apparent that the passing of the Bill and the enactment of the Marine Insurance Act 1906 was imposed by the needs and problems of the day and of the mercantile community which desperately sought to codify, in the form of legislation, marine insurance. Commercial needs, usage and customs also imposed the need for the creation of a piece of legislation regulating marine insurance. The mercantile community needed to be reassured that the undertaken risks to be insured were such that they could be legally protected. Also, the flourish of gaming and wagering contracts, during this era, increasingly evoked the need for legal protection and the way to achieve that was through the passing of an Act that would render contracts with illegal content void. In a similar way, other problematic points of the marine insurance practice.[22]

1.2. The history and legislative framework of marine insurance in Greece

The French Commercial Code of 1807 formed the basis of the Greek Commercial Code of 1835.[23] Due to the leading role that maritime affairs played in the Greek economy - even from the very early times - various laws relating to its regulation have been passed through the years and, as a result, there has been a separation from the Commercial Code of the part relating to the regulation of maritime law.[24] Thus, two orders for the crea-

[22] Such as the lack of good faith and the way to deal with it, valuation and the measure of indemnity, as well as subrogation issues, urged the enactment of the Marine Insurance Act 1906.

[23] To this we are being lead by the fact that articles 116-154 of the latter are an identical translation of the relevant ones in the French Commercial Code. These articles were altered, transformed and enriched by Law ΓΨΙΖ/24-04-1910 which in its turn was also based on French Law as well as on the Italian Commercial Code of 1882, the Belgian Commercial Code of 1908 and the German Commercial Code of 1897 and also on various international conventions.

[24] This was enacted by various reasons, such as the nature of the work conducted on a vessel, the specific conditions under which maritime affairs are pursued, the specific nature and character of the vessel as a means of maritime transportation and also, in terms of the latter, its navigation into national and international waters.

tion of the relevant laws were formed, i.e. a) Law 3816/1958 *"For the Procurement of the Code of Private Maritime Law"* and b) Law Decree 187/1973 *"Relating to the Code of Public Maritime Law"*. Finally, the two statutes regulating Greek maritime law are: The *"Code of Private Maritime Law (Law 3816/1958) [ΚΙΝΔ]"*, and *"The Code of Public Maritime Law (Law 187/1973) [ΚΔΝΔ]"*. The legislature resourced to the creation of the two codes, hoping to regulate efficiently all aspects of maritime law.

The main sources that lead to the formation and flourishing of maritime law in Greece are, primarily, maritime custom which is said to be an important source of maritime law and private maritime law, the latter being also substantiated by art. 1 of the Greek Civil Code which states as sources of law the legal rules derived from the context of laws and customs. In Greek law, however, it is accepted that the custom does not render the law void. The former cannot, nevertheless, be a source of law for public maritime law as the latter is governed by the *"principle of legality"* which does not include customs.

In brief, the laws containing maritime features together with the relevant international conventions, ratified in accordance with the Greek Constitution, form the primary sources of maritime law, whereas maritime custom and the general rules of transactions form the secondary sources of maritime law. [25]

Within the context of the Greek Law, until 1997, rules on insurance contracts were incorporated in the Commercial Code. The relevant section in the Commercial Code is today superseded by law 2496/1997.[26] In addition, marine insurance is specifically regulated by the provisions of Chapter XIV of the Code of Private Maritime Law (CPML),[27]articles 257 - 288.[28] According to CPML section 257, sections 189- 225 of the Commercial Code govern also marine insurance. However, given that Law 2496/1997 has superseded the Commercial Code, these sections have been

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[25] Marine Insurance owes its appearance to the maritime perils encountered in the process of conduct of maritime affairs. Marine insurance law contains a combination of principles of maritime and insurance law. As a concept it is said to have appeared at the end of the Middle Age, when the concept of perils was initially established. It is the most ancient form of insurance and is considered as part of maritime law (Tsatsos D, Dountas M, Zepos K(1954) Insurance Law Lectures, Sakkoulas Publications, Athens).

[26] Wilhelmsen TL (1998) The Marine Insurance System in Civil Law Countries – Status and Problems, Marius 242,1, Utgitt Av Sjorettsfondet, Oslo.

[27] Namely, in Greek, Κώδιξ Ιδιωτικού Ναυτικού Δικαίου (ΚΙΝΔ).

[28] Wilhelmsen TL(2001) Issues of Marine Insurance: Duty of Disclosure, Duty of Good Faith, Alteration of Risk and Warranties,Marius 281, Simply YearBook 2001, 45, Utgitt Av Sjorettsfondet, Oslo.

replaced by articles 1-33 of the Law 2496/1997 while the provisions of the general insurance and commercial law may apply in a supplementary way, i.e. to the extent that they are consistent with provisions relating to marine insurance which are compatible with the nature of marine insurance and not modified by any other special provisions.[29] This is due to the *"lex specialis"* principle in Greek law, as per which where various laws regulate the same issue, the more specialised law prevails over the more general one.[30]

1.3. The history and legislative framework of marine insurance in Norway

In Norway, the codification of maritime law dates back to the 1270's and the reign of the Norwegian King Magnus Hakonson. Christian V's Danish and Norwegian Law of 1687, which included a chapter relating to insurance, was in force until the passage of the Merchant Marine Act 1893. [31]

Marine insurance is regulated by the Insurance Contracts Act 1986 (ICA)[32], with which it is mandatory that all insurance contracts comply with,[33] apart from insurance of commercial activity performed by ships which have to be registered according to the Maritime Code of 1994, or commercial activity dealing with international trade. Thus, for marine insurance, there is complete contractual freedom, limited only by general contractual principles against illegal and unfair contracts.

In the Scandinavian countries, the conditions for marine insurance have traditionally been incorporated into an extensive private codification. In Norway, this codification is published as a Marine Insurance Plan, known as the Norwegian Marine Insurance Plan.[34] The Plan is a kind of private legislation aiming to regulate all practical questions concerning marine insurance, even those questions which are also dealt with in the public legislation which is to be used instead of the governing Insurance

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29 Spaidiotis K (1999) Marine Insurance Law in Greece, Maritime Advocate, Is. 7.

30 Rokas I (1995) Introduction to the Law of Private Insurance, 4th edn, Oikonomikon Publications, Athens.

31 Derrington S (1998) The Law Relating to non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance: A Case for Reform, PhD Thesis, University of Queensland, Australia.

32 Dated 16 June 1989.

33 Norwegian Insurance Contracts Act sections 1-3.

34 The Norwegian Marine Insurance Plan.

Contracts Act. In this way private legislation attempts to also regulate issues where the governing Insurance Contracts Acts is not mandatory and to provide other solutions. In addition, mandatory provisions in the governing Insurance Contracts Act are incorporated in the Plan. The provisions, however, are not lifted out of the mandatory regime of the Insurance Contracts Act.[35]

The Plans contains general provisions for all kinds of marine insurance, and special provisions for special interests.[36] In fact the Norwegian Marine Insurance Plans have taken over the ordinary legislative tasks, in the area of marine insurance, at the same time having clear similarities with ordinary legislation. The Plans are also accompanied by extensive commentaries which thoroughly explain the individual provisions. The Commentaries constitute an integral part of the Plans and are as significant as ordinary preparatory works of Acts of Parliament.[37] It can be said that, formally, the Plan constitutes a standard contract which must be incorporated in the individual agreement by way of reference made in the policy. In many ways, however, the Plan bears much resemblance to a piece of legislation, except that its drafting has been carried out by private groups and the Plan as such has not been passed by Parliament.

The first Norwegian Marine Insurance Plan dates from 1871[38] and was introduced in 1876. It was amended in 1894, 1907 and again in 1930. In 1964, there was a new and extensive amendment, caused mainly by the ship-owners' need for a more extensive cover for error in construction and materials.[39] The 1964 Marine Insurance Plan was amended again in 1996,[40]

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35 Even if the Plan as such is directory, the parties are obliged to follow the regulation taken from mandatory provisions.

36 Wilhelmsen TL (1998) The Marine Insurance System in Civil Law Countries-Status and Problems, MarIus No 242, 15.

37 Bull HJ (1999) The Norwegian Marine Insurance Plan of 1996, In Huybrecht M (ed) Marine Insurance at the Turn of the Millennium, Vol. I, Intersentia, Antwerp.

38 Derrington S (1998) The Law Relating to non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance: A Case for Reform, PhD Thesis, University of Queensland, Australia.

39 The 1964 revision resulted in the cargo clauses being taken out of the Marine Insurance Plan. A separate Plan for Insurance for the Carriage of Goods was established in 1967, which was amended in 1995 and resulted in the Norwegian Cargo Clauses: Conditions relating to Insurance for the Carriage of Goods of 1995, Cefor Form No 252 (Norwegian Cargo Clauses). This amendment was mainly the result of the new Insurance Contracts Act in Norway, which is mandatory concerning national transport of goods. Many clauses, thus, had to be amended to conform to the Insurance Contract Act's requirements. For the

its' form being similar to that of the 1964 one. In terms of content the 1996 Plan is somehow new, if compared to the 1964 Plan. The modus of performing the revision has been based on the pattern of looking at each individual provision of the 1964 Plan and critically evaluating it against the criteria which made its revision necessary. This amendment was caused by changes in the legislative framework and the evolution and contemporary needs of the shipping industry, as well as by the various problems encountered in the marine insurance market. In effect, the Plan was drafted by a Committee consisting of members of all different groups or organisations effecting marine insurance contracts.

Before the introduction of the 1996 Plan, the former Plans had been supplemented by a set of agreed conditions concerning problems where the provisions in the Plan were outdated or insufficient. The 1996 Plan seeks to incorporate such amendments directly into the Plan instead of using separate conditions, and to do so the Drafting Committee has also established a Permanent Revision Committee, to make yearly amendments of the Plan, to the extend needed each time.[41]

1.4. The history and legislative framework of marine insurance in France

In France, marine insurance can be traced back to around 1681, when *"Le Guidon de la Mer"* - which provided for an office of insurance and dealt with the time in which a claim could be admitted and the conditions upon which a ship and its cargo might be insured together - was published.[42] However, marine insurance has evolved, since the Napoleonic *"Code Civil"*, through the Law of 13 July 1930, the codification of July 1976 and a series of later laws integrated in the *"Code des Assurances"* consequent upon directives imposed by the European Union.

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most parts, these mandatory requirements are also given effect for international carriage of goods, even if the Norwegian Insurance Contract Act is not mandatory for this kind of insurance.

40 Wilhelmsen TL (1998) The Marine Insurance System in Civil Law Countries-Status and Problems, Marlus No 242, 15.

41 Bull H.J (1999) The Norwegian Marine Insurance Plan of 1996, In Huybrecht M (ed) Marine Insurance at the Turn of the Millennium, Vol. I, Intersentia, Antwerp.

42 Derrington S (1998) The Law Relating to non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance: A Case for Reform, PhD Thesis, University of Queensland, Australia.

The law of 13 July 1930 forms the basis of the insurance contract, its provisions having been integrated into *"Book One"* of the *"Code des Assurances"*. [43] The law addresses the first system of protection for insured parties. Whilst recognising the principle of freedom of contract, it also addresses matters perceived to be prejudicial to the assureds and it has been designed to protect assureds by using provisions of rather an imperative than regulatory nature.

The law of 8 November 1955 foreshadowed the codification of the insurance texts but it was only much later that codification was finally achieved by the Decrees of 16 July 1976, published on 21 July 1976.[44] Finally, reform of marine insurance was achieved by Law No. 522 of 3 July 1967 and the Decree No. 64 of 19 January 1968. Upon entry into force on 26 April 1968, this statute abrogated articles 331-396,431,432 and 435 of the "*Code de Commerce*" and any other provision which was contrary to the new provisions of the Statute. However, the Laws of 1930 and 1967 do not depend on or have pre-eminence over each other. By Law No.92-665 of 16 July 1992, the Law of 1967 was included in the *Code des Assurances* and became Titre[45] VII. The new Titre VII is virtually in identical terms with the law of 1967. Other reforms have consisted principally of the integration into French law of EC Directives. The EC Directive of 18/6/1992, concerning non-life insurance, has been integrated into French Law by Law No 94-5 of 4/1/1994.

Another important source of marine insurance law in France rests in the general professional usages. Some of these professional or local "customs" have been reduced to writing and are known as *"Recommendations of the French and foreign societies established in France (29.2.80)"*, *"Communal regulations concerning marine and transport insurance (29.2.80)"*, *"Customary usages of marine and transport insurance (16.9.82)"* , and *"Rules of moral obligations (20.4.83) and rules of the market (9.7.84)"*.[46]

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[43] The law of 13 July 1930 forms the basis of French insurance law and, still, even after several revisions, remains its foundation.

[44] The impetus for this ambitious project was the two EU directives of 24 July 1973, relating to the freedom of establishment of insurance business. Codification was effected by two distinct decrees, i.e. the Decree No. 76-666 of 16 July 1976 relating to the codification of the legislative texts concerning insurance, and the Decree No. 76-667 of 16 July 1976 relating to the codification of the regulatory texts concerning insurance.

[45] i.e. title.

[46] Derrington S (1998) The Law Relating to non-Disclosure, Misrepresentation and Breach of Warranty in Contracts of Marine Insurance: A Case for Reform, PhD Thesis, University of Queensland, Australia.